

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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BOB SAKS AMC-JEEP, INC.,

Petitioner-Appellant,

v

DEPARTMENT OF TREASURY,

Respondent-Appellee.

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UNPUBLISHED  
September 11, 2014

No. 316139  
Tax Tribunal  
LC No. 00-432092

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BOB SAKS, INC.,

Petitioner-Appellant,

v

DEPARTMENT OF TREASURY,

Respondent-Appellee.

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No. 316154  
Tax Tribunal  
LC No. 00-432093

Before: MURRAY, P.J., and DONOFRIO and BORRELLO, JJ.

PER CURIAM.

In this consolidated case involving the now repealed Single Business Tax (SBT),<sup>1</sup> the Michigan Tax Tribunal sustained respondent's deficiency determinations of \$367,124 against petitioner Bob Saks, Inc., and \$101,538 against petitioner Bob Saks AMC-Jeep, Inc. Petitioners appeal as of right from that order, and we affirm.

**I. BACKGROUND**

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<sup>1</sup> Michigan's Single Business Tax Act (SBTA), 1975 PA 228; MCL 208.1 *et seq.*, was repealed effective December 31, 2007 by 2006 PA 325. The period at issue in this case is June 2003 through December 2005, so the SBTA applies.

This case involves the SBT liability of two related corporations, petitioners Bob Saks, Inc. and Bob Saks AMC-Jeep, Inc., for the period from June 2003 through December 2005. Petitioners are part of a group of companies commonly known as the Bob Saks Auto Group. Petitioner Bob Saks, Inc. does business as Farmington Hills Holding Company. The shareholders of petitioner Bob Saks, Inc. are Bob Saks Auto Group founder Robert S. Mechigian and his three sons Robert D. Mechigian, Kevin Mechigian, and Mark Mechigian. Petitioner Bob Saks, Inc. owns all of the outstanding stock of Bob Saks Toyota Inc.,<sup>2</sup> Bob Saks Oldsmobile, Inc., and Bob Saks Dodge, Inc.

On February 20, 2002, the auto group created three employee leasing companies (ELCs). The ELCs were called Bob Saks Imports, Inc. ELC, LLC; Bob Saks Buick Oldsmobile ELC, LLC; and Bob Saks Dodge ELC, LLC. The ELCs purported to be professional employment organizations as that term is defined in MCL 208.4(4). Robert D. Mechigian owned 100% of Bob Saks Imports ELC, LLC; Kevin Mechigian owned 100% of Bob Saks Buick Oldsmobile ELC, LLC; and Mark Mechigian owned 100% of Bob Saks Dodge ELC, LLC. Robert D. was president of Bob Saks Toyota, Kevin was president of Bob Saks Oldsmobile, and Mark was president of Bob Saks Dodge.

On April 1, 2002, the ELCs entered into employee leasing agreements with their respective dealerships.<sup>3</sup> The agreements called for the purported employees of the ELCs to be leased to the dealerships, and for the ELCs to provide human resource services to the dealerships. Under the agreements, each ELC (designated “Company”) agreed to do the following for the dealership (designated “Client”):

1.1 Company Services. Company shall, or shall contract with another organization to, (a) employ persons with competent skills to perform the tasks required by the job for which they are employed at Client’s worksite (“Worksite Employees”); (b) prepare, file, withhold and pay all payroll taxes under Federal, State and Local laws for the Worksite Employees (Worksite Employees do not include Client’s officers); (c) be responsible for administrative matters and providing contracted fringe benefits relating to compensation of the Worksite Employees; (d) maintain insurance coverage for the Worksite Employees as required in this Agreement; (e) pay wages (including computation of wages and the withholding of applicable Federal, State and local taxes and Federal Social Security payments) to the Worksite Employees without regard to payments by the Client as required in this Agreement; (f) remit withholdings to the proper governmental authorities and make employer contributions for Federal FICA and Federal and State unemployment insurance payments; (g) develop and implement employment procedures practices and policies for Worksite Employees; (h)

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<sup>2</sup> Bob Saks Toyota, Inc. is also referred to as Bob Saks Imports, Inc.

<sup>3</sup> Bob Saks Imports ELC, LLC formed an agreement with Bob Saks Toyota Inc., Bob Saks Buick Oldsmobile ELC, LLC formed an agreement with Bob Saks Oldsmobile, Inc., and Bob Saks Dodge ELC, LLC formed an agreement with Bob Saks Dodge, Inc.

control, supervise and discipline all Worksite Employees; (i), terminate all Worksite Employees who are unable or unwilling to properly perform the job for which they are employed; and (j) to make, maintain and retain all personnel and payroll files, records and reports which are required with respect to all Worksite Employees. Company shall commence providing such services upon the first day of payroll and whether such the Company directly provides such services or contracts with another organization to provide such services, the Company shall be responsible and liable to the Client for the performance of all such services.

The dealerships agreed to pay the ELCs a monthly fee for this service. The individual dealerships informed their employees that their employment with the dealerships was terminated, and that, although they would continue to work at the dealership, their new employer would be the ELC.

At the same time the employee leasing agreements were entered, each ELC entered into a payroll agent agreement with petitioner Bob Saks, Inc. The agreements called for petitioner to perform payroll functions for the ELCs, including paying wages, maintaining records, and making all appropriate government filings. The agreements required the ELCs to pay petitioner a monthly fee for this service. The auto group operated under this model during the tax periods at issue.

Respondent audited petitioners' SBT returns for the tax periods at issue. Respondent determined that petitioners—not the ELCs—were the employers of the staff at the dealerships. Accordingly, respondent assessed a deficiency because petitioners had understated their employee compensation. Petitioners contested the assessment and respondent held an informal conference. Respondent affirmed the assessments and petitioners filed their petition in the Michigan Tax Tribunal. The tribunal made the following findings of fact:

Pursuant to the Payroll Agent Agreement, Petitioner withheld all federal and state employment taxes, made all tax deposits, filed employment tax returns, and filed and furnished Forms W-2, Wage and Tax Statement, to the ELCs' employees. Petitioner filed one withholding tax return per period using its name and employer identification number, regardless of the number of ELCs for whom it was acting as an agent. Each ELC maintained its own separate bank account, held its own federal employer identification number, and filed separate federal corporate income tax and SBT returns. The ELCs did not individually file employment tax returns. None of the ELCs were registered for Michigan withholding taxes. Petitioner paid employee wages and taxes for the employees out of its own account and then was reimbursed by the ELCs for such payments.

The tribunal affirmed the assessments, and petitioners appeal to this Court.

## II. ANALYSIS

“In the absence of fraud, review of a decision by the Tax Tribunal is limited to determining whether the tribunal erred in applying the law or adopted a wrong principle; its factual findings are conclusive if supported by competent, material, and substantial evidence on

the whole record.” *Mich Bell Tel Co v Dep’t of Treasury*, 445 Mich 470, 476; 518 NW2d 808 (1994). But matters of statutory interpretation are questions of law that we review de novo. *In re Hill*, 221 Mich App 683, 689; 562 NW2d 254 (1997).

The SBTA, imposed a tax on “business activity” within the state of Michigan. MCL 208.31. “The SBTA employ[ed] a value-added measure of business activity, but its intended effect [was] to impose a tax on the privilege of conducting business activity within Michigan.” *ANR Pipeline Co v Dep’t of Treasury*, 266 Mich App 190, 198; 699 NW2d 707 (2005).

A taxpayer’s SBTA tax base was business income subject to adjustments provided by the statute. MCL 208.9. MCL 208.9 directed the taxpayer to “[a]dd compensation” to its tax base MCL 208.9(5). “[C]ompensation” means all wages, salaries, fees, bonuses, commissions, or other payments made in the taxable year on behalf of or for the benefit of employees, officers, or directors of the taxpayers.” MCL 208.4(3).

MCL 208.4(4) states the following: “For tax years that begin after December 31, 2003, for purposes of determining compensation of a professional employer organization, compensation includes payments by the professional employer organization to the officers and employees of an entity whose employment operations are managed by the professional employer organization.” As a corollary, the statute also states, “Compensation of the entity whose employment operations are managed by a professional employer organization does not include compensation paid by the professional employer organization to the officers and employees of the entity whose employment operations are managed by the professional employer organization.” MCL 208.4(4). MCL 208.4(4) defines professional employer organization [PEO] as follows:

As used in this subsection, “professional employer organization” means an organization that provides the management and administration of the human resources and employer risk of another entity by contractually assuming substantial employer rights, responsibilities, and risk through a professional employer agreement that establishes an employer relationship with the leased officers or employees assigned to the other entity by doing all of the following:

- (a) Maintaining the right of direction and control of employees’ work, although this responsibility may be shared with the other entity.
- (b) Paying wages and employment taxes of the employees out of its own accounts.
- (c) Reporting, collecting, and depositing state and federal employment taxes for the employees.
- (d) Retaining the right to hire and fire employees.

The dispositive question in this case is whether the ELCs meet this statutory definition of a PEO. If the ELCs are PEOs, then the statute directs that petitioners’ compensation does not include the compensation paid by the ELCs to the employees who serve at the dealerships. On the other hand, if the ECLs are not PEOs, this subsection does not apply.

To qualify as a PEO, an organization must perform all four functions enumerated in the statute under a professional employment agreement with the entity being supplied with employees. The tribunal held that MCL 208.4(4)(b) and (c) were not met because the ELCs did not and could not pay wages and employment taxes from their own accounts and did not and could not report collect and deposit state and federal taxes for the employees.

In reaching this decision the tribunal relied specifically on these findings: “The ELCs did not individually file employment tax returns. None of the ELCs were registered for Michigan withholding taxes. Petitioner paid employee wages and taxes for the employees out of its own account and then was reimbursed by the ELCs for such payments.” The statute clearly and unambiguously states that a PEO must pay the employees “from its own accounts.” Although there is nothing in the statute to prohibit a PEO from fulfilling its contractual duty to pay and report wages and taxes by hiring a payroll company, the wages and taxes cannot be paid out of that payroll company’s accounts. Here, the tribunal specifically found that the wages were paid out of the account of petitioner Bob Saks, Inc. and not out of the accounts of the ELCs. Petitioners, not the ELCs, paid wages and taxes for the employees. A PEO that “contractually assume[s]” certain employer duties, must perform those duties, including paying employee wages and taxes out of its own accounts.

The tribunal’s finding that wages were paid from petitioner Bob Saks Inc. and not from the ELCs is “supported by competent, material, and substantial evidence on the whole record.” *Michigan Bell Tel Co*, 445 Mich at 476. The payroll service agreement states that petitioner was responsible for paying wages and the ELCs were responsible for reimbursing petitioner. Kevin Mechigian testified that he was “not sure” who physically issued the payroll checks but stated that his payroll check came from Farmington Hills Holding Company (petitioner Bob Saks, Inc.). Because there is competent factual support on the record, the tribunal’s findings of fact are conclusive. *Id.* The ELCs, therefore, did not meet the requirement of subsection (b).

Additionally, the tribunal found that none of the ELCs was registered for Michigan withholding taxes. The “Registration for Michigan Taxes” forms for the ELCs that were submitted into evidence support this finding. The ELCs were, therefore, unable to perform the required functions under subsection (c).

Therefore, because the tribunal’s factual findings were supported by competent, material, and substantial evidence and because the tribunal did not err in applying the law in holding that subsections (b) and (c) were not met, there are no grounds to reverse.

Affirmed.

/s/ Christopher M. Murray

/s/ Pat M. Donofrio

/s/ Stephen L. Borrello